UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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FUJUN JIAO,

Plaintiff,

-against-

SHI YA CHEN,

Defendant.

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03 Civ. 0165 (DF)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

DEBRA FREEMAN, United States Magistrate Judge:

INTRODUCTION

In this action, before me on consent pursuant to 28 U.S.C. § 636(c), Plaintiff Fujun Jiao ("Jiao") seeks relief under the Fair Labor Standards Act (the "FLSA") and New York law for the alleged failure of defendant Shi Ya Chen ("Chen") to pay him minimum wage and overtime compensation to which he was entitled during the period from April 2001 to October 2002, when he purportedly worked for Chen at a small hotel in midtown Manhattan. According to Chen, the hotel was actually owned by the Dalton Group USA, Inc. ("Dalton USA"), of which she was the president during the relevant period. Jiao, however, has not named Dalton USA in this action, but rather has sued Chen individually.[1] This Court has jurisdiction over Jiao's federal claims

[1] Jiao originally named as defendants both Chen and the First International Travel, Incorporated ("First International"), a company owned by Chen and located in the same building as the hotel where Jiao was employed. (*See* Complaint, dated Dec. 23, 2002 (Dkt. 1); *see also* Trial Transcript, dated December 14-15, 2005 ("Tr."), at 195-96, 201.) By Memorandum and Order dated August 4, 2004, this Court granted First International's motion to dismiss the Complaint against it. *Jiao v. First International Travel, Inc.*, No. 03 Civ. 0165 (DCF), 2004 WL 1737715 (S.D.N.Y. Aug. 4, 2004). This Court held that Jiao had failed to properly serve First

pursuant to 28 U.S.C. § 1331 and exercises supplemental jurisdiction over Jiao's state law claims pursuant to 28 U.S.C. § 1367.

The Court held a two-day bench trial on December 14 and 15, 2005. During Jiao's affirmative case, the Court heard testimony from both Jiao and Chen. After Jiao rested, Chen moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50. Finding that Jiao had presented a legally sufficient evidentiary basis to support his claims, the Court denied that motion. Chen then presented her own case, calling four witnesses to testify. Her principal witness was her son and assistant, Simon Liu ("Liu").[2] In addition, Chen called, for relatively brief testimony, Xiao Quin ("Quin"), a college acquaintance of Liu who had stayed at the hotel for one night in March 2002; Yun Fai Xaio ("Xaio"), who was in the "tourism business" and who had taken "delegations" to stay at the hotel; and Kam Tse ("Tse"), a director of the Dalton International Group ("Dalton International"). Having been called to the stand on plaintiff's direct case, Chen did not testify again on her own behalf.

International, and that First International was not a proper party to Jiao's action, as Jiao had not shown that it had any connection to the alleged labor violations that form the basis of Jiao's Complaint. *Id.* at *5-6.

[2] In his direct testimony, Liu identified himself only as having worked for Dalton USA as the "assistant to [the] president." (Tr. at 220.) As Chen was the president of Dalton USA (*id.* at 288; *see also* Pl. Ex. 1 (Indenture between Dalton International Group, Inc. and Dalton Group, USA, Inc., dated Oct. 25, 2000 ("Indenture") (signed by Chen as "President")), Liu thus portrayed himself as having been employed as Chen's assistant. The Court did not learn that Liu was Chen's son until this fact was elicited by Jiao's counsel. (*See* Tr. at 288.) Similarly, the Court did not learn until cross-examination that, rather than being a full-time employee of Dalton USA, Liu was actually enrolled as a full-time college student, at the University of Pennsylvania, at the time he worked at the hotel, and that his job at the hotel was principally a summer position. (*See id.* at 288-91.)

With some exceptions, the Court finds Jiao's testimony credible with respect to the terms under which he was employed to work at the hotel, the duration of his employment, and the nature of the work he performed. Although the Court does not fully credit Jiao's testimony that he actually performed services for the hotel 24 hours a day, the Court nonetheless accepts that Jiao was required to be present at the hotel at almost all times, and that he was expected – or, at a minimum, was permitted – to perform "after hours" functions for Chen at the hotel, such as taking reservations and admitting late-arriving guests. By contrast with Jiao, the testimony of Chen and her son, Liu, were less worthy of credence, and none of the other witnesses who testified on Chen's behalf had sufficient personal knowledge to refute the key elements of Jiao's testimony.

Furthermore, based on the evidence presented at trial, this Court determines that Jiao's claims were timely filed under the applicable statutes of limitations, that Jiao was an "employee" who was "engaged in commerce" for purposes of the FLSA, and that Chen was an "employer" of Jiao under the FLSA and New York law. Accordingly, Chen is liable to Jiao for damages, as set forth below, for failing to pay Jiao adequate minimum wage and overtime compensation.

Pursuant to Fed. R. Civ. P. 52(a), the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. PARTIES

Prior to April 2001, Jiao was living with a friend in New Jersey. (Tr. at 12.) He had graduated from Peking University in Beijing (*id.* at 93), but he was unemployed, and, at the time, he was only attending school to improve his English (*id.* at 12-13). In April 2001, however, Jiao learned, through a mutual friend of a "Mr. Guan" ("Guan"), that Guan was going to be leaving his job at a New York City hotel. (*Id.* at 13, 84-85.) On April 23, Jiao interviewed for the job with defendant Chen, in her office. (*Id.* at 14.) According to Jiao, Chen did not describe for him the expected duties of the available position; rather, she only asked him if Guan had told him everything about the job. (*Id.* at 15.) Chen then hired Jiao, telling him to start in two days. (*Id.*)[3] Jiao started working at the hotel on April 25, 2001, in a residential position. (*Id.* at 15, 23.) He continued to work there, in the same position, until he was terminated, apparently by Chen, in or about the first week in October 2002. (*Id.* at 48.)[4]

As noted above, Chen, during the relevant period, was the president of Dalton USA. (*See supra* at n.2.) It appears that Dalton USA owned the building at 21 East 33rd Street, New York, New York, where the hotel was located, and also owned the hotel. (*See* Pl. Ex. 2 (Federal Tax Form 1120, for Dalton USA, for the year from Aug. 1, 2001 to July 31, 2002 ("1120 Tax Form")).) According to Chen, when Jiao worked at the hotel, he worked not for her, but for Dalton USA. (*See* Tr. at 212.)

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[3] According to Tse, who testified on Chen's behalf as a representative of Dalton International, Chen did not have the power or authority to hire or fire Jiao, and any such decision was necessarily made by Dalton USA's corporate parent in China. (*See* Tr. at 344-45, 349-51 (testifying that Chen "was also [an] employee. And how could she fire other people, they are on the same level.").) Yet assuming the hotel was in fact owned by Dalton USA, it is simply not credible that the president of that company lacked the authority to hire or fire someone for the position held by Jiao, a position described by Liu as involving predominantly menial labor. (*See id.* at 228, 238.) Further, the Court credits Jiao's testimony that he was hired on the spot by Chen upon his interview, which also supports the conclusion that Chen had full authority to hire Jiao.

[4] Although Liu testified that, to the best of his recollection, Jiao started working at the hotel in June 2001 and was terminated in August 2002 (Tr. at 233-34), defendant offered no employment records to confirm Jiao's dates of employment, and the Court finds Jiao's testimony regarding the period of his employment to be credible.

II. JIAO'S EMPLOYMENT AND COMPENSATION

A. Burden of Proof

The FLSA requires that employers be able to demonstrate their compliance with its provisions by maintaining adequate employee records. 29 U.S.C. § 211(c). Under the FLSA's implementing regulations, the employer must retain, for at least three years, any payroll records and either written employment agreements or memoranda summarizing the terms of oral employment agreements. 29 C.F.R. § 516.5. New York law imposes similar record-keeping requirements on employers. *See* N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.6 (requiring employers to keep detailed records of employee wages and hours for six years).

Under the FLSA, an employee seeking to recover unpaid minimum wages or overtime "has the burden of proving that he performed work for which he was not properly compensated." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). When an employer fails to comply with the FLSA's record-keeping requirements, however, the plaintiff may satisfy his burden

> if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

Id. at 687-88; *see also Reich v. So. New England Telecomms. Corp.*, 121 F.3d 58, 66 (2d Cir. 1997); *Yang v. ACBL Corp.*, 427 F. Supp. 2d 327, 331-34 (S.D.N.Y. 2005); *Moon v. Kwon*, 248

F. Supp. 2d 201, 219 (S.D.N.Y. 2002). The plaintiff is able to meet his initial burden under the statute "by relying on his recollection alone." *Yang*, 427 F. Supp. 2d at 335-36 (citing cases).

Like the FLSA, "in the absence of adequate records," New York law also "places the burden on the employer to show the employee was properly compensated." *Id.* at 337 n.15 (citing N.Y. Lab. L. § 196-a). As the burden shift under New York law places on the employer the "burden of showing by a preponderance of the evidence that [the] plaintiff was properly paid for the hours he worked," if the employer is unable to meet its burden under the FLSA "to 'negative the reasonableness of the inference' arising from the employee's evidence of his hours and wages, then *a fortiori* [the employer] could not satisfy the more demanding burden" under New York law. *Id.* (quoting *Mt. Clemens*, 328 U.S. at 688) (internal citation omitted).

In this case, the Court has been confronted with an employer that failed to maintain any records whatsoever regarding Jiao's employment, including the duration of his employment (*see supra* at n.4), the number of hours he worked, and the compensation paid for those hours. It is undisputed that Jiao had no written employment contract and that he was paid in cash by Chen. Under these circumstances, the Court will consider whether Jiao has satisfied his burden to show the amount and extent of his work "as a matter of just and reasonable inference."

B. The Hotel

The hotel where Jiao was employed was quite small. It did not occupy the entire building at 21 East 33rd Street, but rather only the third floor of that building. (*See, e.g.*, Tr. at 211, 220, 271.) It had only eight guest rooms, each capable of accommodating up to three guests. (*See id.* at 16.) The first floor of the building was occupied by a Chinese restaurant. (*Id.* at 120, 203.) On the second floor were a travel agency owned by Chen (*id.* at 195-96; *see also* *supra* at n.1) and a gift shop (Tr. at 124, 204). The building had a gate at the entrance, which was kept locked, at least after certain hours. (*Id.* at 124, 234-35.) Guests needing access to the building when the gate was locked could ring a bell, and someone on either the second or third floor of the building could let them in. (*Id.* at 28, 235-36.) The building had no elevator, and guests climbing the stairs to the third-floor hotel would necessarily first pass the offices of Chen's second-floor travel agency. (*Id.* at 132-33, 229.)

The guests of the hotel were predominantly from China, Hong Kong or Taiwan. (*Id.* at 21-22.) Liu testified that the hotel (which he and the other defense witnesses called a "hostel") was primarily intended to afford lodging to visiting delegations from foreign corporations that had a relationship with Dalton USA and its parent company in China.[5] (*Id.* at 220-22.) For at least some period of time, however, the hotel promoted itself through newspaper advertisements and fliers. (*Id.* at 22; *see also id.* at 292-94.) Indeed, Chen called one witness (Quin) who testified that she and two other college students from Philadelphia stayed at the hotel when they visited New York City (*id.* at 248-49), demonstrating that the hotel also rented rooms to out-of-state guests who were not members of foreign "delegations" or affiliated with Dalton USA or any related corporate entity.[6]

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[5] Dalton USA, which, according to Chen, was known as Dalton International prior to October 25, 2000 (Tr. at 196; *see also* Indenture (Dalton International conveyed property "known as 21 E. 33rd St." to Dalton USA)), was described by Liu as a wholly owned subsidiary of Shanghai (Z.J.) Hi-Tech Park, Ltd., "a publicly listed company in China" (Tr. at 221-22, 318; *see also* 1120 Tax Form (attached "Statement 2")).

[6] According to Jiao, the hotel also accepted guests by the hour, during the day (Tr. at 69-73, 161, 183), although Liu denied that the hotel did any hourly business (*id.* at 238-39). The resolution of this question of fact is not necessary to the Court's decision in this matter.

The hotel typically charged between 80 and 95 dollars per night for a room. (*See id.* at 158-59, 192.) Where a room was shared by more than one guest, each guest was charged individually. (*Id.* at 170.) According to Jiao, the hotel's revenues during the time he was there sometimes exceeded $25,000 per month, and likely exceeded $200,000 per year. (*Id.* at 169, 160-61.) Based on a Dalton USA tax return, however, Chen testified that, for the year from August 1, 2001 to July 31, 2002, the gross income of the hotel was only about $30,000, and that the hotel was losing money. (*Id.* at 192-93.)

C. Jiao's Position and Responsibilities

According to Jiao, he learned from Guan, who previously held the job, that Jiao's responsibilities at the hotel would include doing "everything" for the hotel, including taking reservations, answering the phone, collecting payments from guests, giving them receipts, and cleaning the guest rooms every day, including changing the bed linens and cleaning the bathrooms. (Tr. at 86.) Jiao testified that, once on the job, he in fact took, recorded and confirmed reservations (*id.* at 18, 20-21); collected payments and gave out receipts (*id.* at 18-19, 43); manned the reception desk and watched the monitor that showed the gate (*id.* at 23-25); let guests in at all times of the day and night and provided them with room keys (*id.* at 26-29); checked guests out at any times they desired (*id.* at 45-46, 129); carried guests' luggage (*id.* at 18); provided wake-up calls on request (*id.* at 129); washed bed linens and towels on a daily basis (*id.* at 16, 19, 118-19); put out soaps and shampoos (*id.* at 16); vacuumed the carpet (*id.* at 17); painted the hotel (*id.*); changed lights (*id.*), called for air conditioning and roof repair (*id.* at 18); and even did snow removal as needed (*id.* at 121).

Jiao testified that he understood his work arrangement to permit him to leave the hotel only on Thursday afternoons, from 12:00 or 1:00 p.m. (after he had finished the laundry for that day) until 6:00 p.m., when he would be expected to return. (*Id.* at 29-30.) He testified that, when he was not cleaning the hotel rooms or doing the laundry, he was generally stationed on the third floor, at the reception desk in the hotel's small lobby, where he could answer the telephone and view the door monitor. (*Id.* at 23-25, 35.)

According to Jiao, he did not have the "freedom" to leave the hotel other than on Thursday afternoons. (*Id.* at 37.) He considered himself to be the only person responsible for the hotel guests, and testified that he had to stay there the "whole time." (*Id.* at 111; *see also id.* at 29-30 (testifying that he worked "24 hours" and explaining that he could not "leave the building [because] [i]f you leave, customers cannot come in").) On this subject, Jiao repeatedly testified that, if he was not present at the hotel, Chen would criticize him. For example, Jiao testified that, if he did not answer the telephone at the hotel, Chen would ask him, "'Where did you go? Why aren't you on your duty?'" (*Id.* at 21.) Similarly, Jiao testified that Chen told him that, if he were to leave the building, "'Who [would] open the door[?] Who [would] watch the video camera?'" (*Id.* at 34.) Jiao testified that he was permitted to sleep in a guest room at the hotel, usually Room 303, if it was available, but that, if all of the rooms were occupied, he would have to sleep on the sofa in the small hotel lobby. (*Id.* at 24, 113-14.) Jiao also testified that he generally ate at his desk, as he was not supposed to leave the hotel premises. (*See id.* at 34-35.)

Contrary to Jiao's testimony, Liu testified that Jiao was merely the "housekeeper" for the hotel (*id.* at 228), and that the time needed for Jiao's housekeeping responsibilities – which included cleaning the rooms, emptying the garbage, and laundering the sheets after guests checked out – was "really minimal" (*id.* at 238-41).[7] Liu testified that, far from being present around the clock, Jiao typically worked at the hotel for only 30.5 hours per week: from 11:30 a.m. to 2:00 p.m. and 7:00 to 10:00 p.m. on Mondays through Fridays, and from 7:00 to 10:00 p.m. on Sundays. (*Id.* at 232.) According to Liu, Dalton USA had a secretary, "Cathy," who was in charge of taking reservations and answering the telephone (*id.* at 222-25), and Cathy and others took care of the hotel when Jiao was not present (*id.* at 232-33). Liu testified that the hotel gate was kept open during the day (*id.* at 234-35), that people on the second floor could take care of monitoring the entrance (*id.* at 235), and that, after hours, the restaurant on the first floor could hold a key for late-arriving guests (*id.* at 240). Liu also testified that the hotel room keys were kept on the second floor (*id.* at 230) and that hotel guests paid on the second floor (*id.* at 231).

Liu further testified that, when present in the hotel, Jiao spent much of his time on his own computer (*see id.* at 243 (noting that Jiao "likes to day trade")), even going so far as to register his own computer-based company, using Room 303 of the hotel as his address (*id.* at 234, 243; *see also id.* at 244 (testifying that the hotel did not rent out Room 303, and that Jiao used that room as his "primary residence")). Chen herself testified that she had not listed Jiao as an employee on a Dalton USA tax return because he worked "part-time and ha[d] his own company." (*Id.* at 194.)[8] It was not demonstrated to the Court, however, how either Chen or Liu was competent to testify about any side business that Jiao had purportedly created, and Chen introduced no documentary evidence to support her assertion that Jiao had such a business. Assuming that Jiao did spend some time on his own computer, the record suggests that he did so while he was stationed at his desk and watching the hotel door monitor. (*See id.* at 251-52 (Quin observed Jiao at a desk near the third-floor hotel entrance, using a computer); *see also id.* at 334-35 (Xaio saw Jiao "watching [the] door" and, at times, "on the computer").) Beyond that, the record contains little competent evidence of the extent of Jiao's personal computer use and is entirely speculative as to whether he was spending his time engaging in personal stock transactions. (*See, e.g.*, *id.* at 335 (Xaio and Jiao "chit-chatted" at times, and Jiao said "I'm doing well, really well, with my . . . stocks.").)

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[7] Liu also testified that Jiao was required to do some "reconciliation" work. (*See id.* at 239-40.)

[8] The Court notes that any issue as to the propriety of this tax return is not before the Court.

As to the scope of Jiao's actual job duties for the hotel, Quin and Xaio buttressed Liu's testimony to some extent by describing their own experiences with the hotel, although those experiences were evidently limited. Quin, who stayed at the hotel for only a single night, testified that, when she arrived, she obtained a key to her room from the second floor, that she paid someone there for the room, and that she carried her own "stuff" to the third floor, without Jiao's assistance. (*Id.* at 248-49.) She also testified that, after going out that evening, she returned to the hotel at approximately 9:00 p.m. and found a note on the door telling her to get the key to the building from the first-floor restaurant. (*Id.* at 252-53.) Similarly, Xaio testified that, when he made reservations for delegations to stay at the hotel, he made those reservations through someone on the second floor, and he paid an "accountant" on the second floor. (*Id.* at 329, 338.) He also testified that, when he brought groups of guests to the hotel, he obtained keys from the second floor (or from the first-floor restaurant, if he arrived in the evening) and then took the guests up to the third floor himself, without asking Jiao for any help. (*Id.* at 329-30, 332, 337-38.)

In general, with respect to the extent of Jiao's work activities, the Court finds the testimony of Jiao more credible than the contrary testimony of Liu, who was the primary witness for the defense on these points. While the Court does not disbelieve the testimony of Quin or Xaio, it finds their testimony limited, and insufficient to render incredible the entirety of Jiao's testimony regarding the many tasks he performed for hotel guests during the period of his employment. The Court accepts, for example, that, while Jiao may not have made reservations for, or accepted payment from, every guest, he did take at least some reservations. Indeed, Jiao credibly identified his handwriting as appearing throughout the reservation book maintained by the hotel. (*Id.* at 55, 81, 89.) On the question of whether tasks such as taking reservations were among Jiao's "job duties," the Court notes that even Liu acknowledged in his testimony that, regardless of whether Jiao was "required" to answer the telephone for the hotel, he was in any event "free" to do so and to "take reservations if he want[ed]." (*Id.* at 242.) The Court credits Jiao's testimony that he took reservations on a regular basis and that he often collected payments from guests, despite the fact that some guests may have paid in China, before their arrival at the hotel, and others may have paid through Chen's travel agency. (*See id.* at 44, 89.)

Further, with respect to Jiao's after-hours duties, the Court notes that even Liu conceded that, if a guest were to arrive at the hotel after 10:00 p.m., Jiao would be the one who would let the guest in. (*See id.* at 311-12.) The Court accepts that, at least on some occasions, Jiao was in fact the one who admitted late-arriving guests, and that Chen expected him to assume that responsibility. The Court further notes that, as Liu himself rarely stayed overnight at the hotel (*see id.* at 292), he was not in a position to refute Jiao's testimony that guests, at times, needed to be admitted past midnight, either because of their late-arriving international flights, or because they had stayed out late, sightseeing (*see id.* at 28-29, 136).

Overall, while the Court finds that Jiao, in his testimony, may have exaggerated the singular importance of his role at the hotel, the Court also finds that he did, in fact, perform a variety of functions for the hotel on a regular basis, and was generally expected to be on the premises, except for a few hours on Thursdays. The Court finds that Jiao usually purchased his food at the restaurant on the first floor and brought it back to the third floor, where he ate at his desk (*id.* at 34-35), even if he may have occasionally stayed at the restaurant to eat his meals (*see id.* at 336-37 (on one occasion, Xaio saw Jiao eating at the restaurant)).[9] The Court also finds that Jiao did, at times, have to sleep in the hotel lobby, even though he more typically had the use of Room 303.

D. Chen's Role in Supervising Jiao

Jiao consistently testified that he worked for Chen at the hotel. (*See* Tr. at 185 ("[I] only work for her."); 186.) It was Chen who hired him (*id.* at 15), who told him how much he would be paid (*id.* at 37), and who paid him in her office on the second floor (*id.* at 39, 144). According to Jiao, it was Chen who told him he could not leave the hotel, except on Thursday afternoons (*id.* at 30); Chen who instructed him as to how to operate the hotel (*see, e.g.*, *id.* at 45 (telling Jiao the rule that the hotel never accepted checks); 182 (telling Jiao to change the sheets everyday)); and Chen who gave him the hotel key and reservation book (*id.* at 25, 77). Jiao testified that he collected money for Chen from the hotel guests, and then gave that money to Chen. (*Id.* at 72, 106-07, 139.) He also testified that he only ventured outside the hotel during his work hours when Chen instructed him to do so, as when she told him, on one occasion, to buy theater tickets for her and certain important guests. (*Id.* at 36, 111.) Jiao testified that it was

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[9] The only testimony in the record suggesting that Jiao ever left the building for meals was provided by Liu, who could not testify that he had ever personally seen Jiao eating elsewhere. (*See* Tr. at 244 (testifying that, in addition to the restaurant on the first floor, Jiao "also like[d] a restaurant one block from us called, Hunan something").)

Chen to whom he had to answer, if he was ever not present or reachable at the hotel. (*See, e.g.*, *id.* at 21, 34.) According to Jiao, if hotel guests ever called Chen with a problem, she would immediately call Jiao, to find out if he was on the job. (*See id.* at 133.) If Jiao did not answer the telephone, Chen would ask him why he was not "on [his] duty." (*Id.* at 21.)

E. Hours Jiao Worked and Compensation He Received

______ Jiao contends that he was either working or "on-call" waiting for a work assignment 24 hours per day, seven days per week, except for approximately 5.5 hours on Thursday afternoons, for a total of approximately 162.5 hours per week. In contrast, Chen maintains that Jiao only had to work 30.5 hours per week. According to Chen, Jiao worked from 11:30 a.m. to 2:00 p.m. and 7:00 to 10:00 p.m. on weekdays; he worked from 7:00 to 10:00 p.m. on Sundays; and he did not work at all on Saturdays.

As discussed above, the Court generally finds Jiao's testimony to be credible concerning the number of hours Jiao worked, and the number of hours he spent waiting for work. Through his recollection, Jiao satisfied his initial burden under *Mt. Clemens Pottery*, establishing that, with the exception of a few hours on Thursdays, he was required to be at the hotel at all times. According to Jiao's sworn testimony, he spent some appreciable amount of his day cleaning the hotel rooms and bathrooms, washing linens, and performing general maintenance on the hotel premises. Jiao credibly testified that, at other times during the day, he was required to sit at the reception desk located in the hotel lobby to monitor the door and answer phones. The Court further credits Jiao's testimony that, during the overnight hours, he was required to remain at the premises, and to answer the telephone or admit late-arriving guests, as necessary, as, during those hours. For her part, Chen has failed to rebut Jiao's sworn testimony as to the amount and extent of his work. She has not provided any records establishing the precise number of hours

Jiao worked. Nor has Chen presented testimonial or other evidence sufficient to convince the Court that, contrary to his sworn statements, Jiao actually worked only 30.5 hours a week. (*See* discussion *supra* at 5-6 (citing *Yang*, 427 F. Supp. 2d at 335-36).)

With regard to compensation, neither party disputes that, throughout the entirety of his employment, Jiao was paid a flat rate of $400 a week in cash, regardless of how many hours he worked. (*See* Tr. at 37-38 (Jiao's counsel willing to stipulate that Jiao earned $400 per week, and Chen's counsel willing to stipulate that Jiao was compensated at a rate of $400 per week plus lodging; Pl. Post-Tr. Br. at 3; Def. Post-Tr. Mem. at 16-17; *see also* Tr. at 41.) Moreover, Jiao credibly testified that he never had any discussion with Chen or anyone else regarding an hourly wage, and there was no evidence presented by either party showing that Jiao's weekly wage included an overtime premium.

CONCLUSIONS OF LAW

I. STATUTE OF LIMITATIONS

Claims under the FLSA accrue "at each regular payday immediately following the work period during which services were rendered." *See Moon*, 248 F. Supp. 2d at 231 (citing 29 FLSA § 255(a)); *see also Yang*, 427 F. Supp. 2d at 337. The FLSA generally has a two-year statute of limitations, unless the plaintiff's "cause of action aris[es] out of a willful violation," in which case the limitations period is three years. 29 U.S.C. § 255(a); *see also Yang*, 427 F. Supp. 2d at 337 ("[A] violation is willful if the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.") (internal quotation marks and citation omitted); *Moon*, 248 F. Supp. 2d at 231 (same). Under New York law, "the limitations period for violations of the state's minimum wage and overtime requirements is six years."

Moon, 248 F. Supp. 2d at 232 (citing N.Y. Lab. L. §§ 198(3), 663(3)); *see also Yang*, 427 F. Supp. 2d at 338.

In this case, Jiao filed his Complaint on January 8, 2003. (*See* Complaint, filed Jan. 8, 2003 (Dkt. 1), at 1.) According to the testimony presented at trial, Jiao began working at the hotel on April 25, 2001. (Tr. at 15.) As the entirety of Jiao's work for the hotel occurred within two years of his commencing this action, this Court need not determine whether any violation of FLSA by Chen was willful; all of Jiao's claims under both the FLSA and New York law are timely.

II. APPLICABILITY OF FLSA TO JIAO'S EMPLOYMENT

As an initial matter, Chen contends that Jiao is not entitled to any relief under the FLSA, arguing that Jiao was not an "employee" of the hotel as defined by the statute. (*See* Tr. at 213-17 (defendant moving for judgment as matter of law); Def. Post-Tr. Mem. at 8-12.) In other words, according to Chen, due to the nature of Jiao's employment, he may only seek relief under New York law.

The FLSA covers any "employee"[10] who "in any work-week is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce." 29 U.S.C. §§ 206(a), 207(a). An employee is "engaged in commerce" under the meaning of the statute if "the work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated local activity." *Mitchell v. C.W. Vollmer & Co.*, 349 U.S. 427, 429 (1955). Even if an employee is not personally "engaged in commerce" under the meaning of the FLSA, the employee may still be covered by the statute if his employer is an "enterprise engaged in commerce," which the statute defines as having at least some employees "engaged in commerce or in the production of goods for commerce" and has an "annual gross volume of sales made or business done [that] is not less than $500,000." 29 U.S.C. § 203(s)(1)(A).

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[10] The FLSA defines "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e)(1).

In this case, Jiao was, for purposes of the FLSA, an employee "engaged in commerce." The Supreme Court has held that hotels are "enterprises having a direct and substantial relation to the interstate flow of goods and people" and thus within Congress' power to regulate under the Commerce Clause. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250 (1964). Although Chen contends that Jiao's job function in the hotel was solely janitorial and thus constitutes "purely local" activity (Tr. at 213-14; Def. Post-Tr. Mem. at 9-12), this Court has already found, based on the evidence presented at trial, that Jiao's functions also included taking reservations on a regular basis, from guests traveling from out-of-state as well as outside the country, *see Smolnik v. Van Dyke*, No. 8:04 Civ. 401, 2006 WL 1401716 (JFB), at *4 (D. Neb. May 19, 2006) (concluding that "management of a motel clearly involves 'trade, commerce, transportation or communication' connected to interstate commerce") (citing *Reich v. Avoca Motel Corp.*, 82 F.3d 238, 239 (8th Cir. 1996)). Thus, by the nature of the work he performed for the hotel, Jiao was, "in practical effect," himself "a part of" the hotel's interstate activities.

Accordingly, both the FLSA and New York law apply to Jiao's claims.[11]

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[11] The Court's conclusion that Jiao's claims are subject to the FLSA is based upon the statute's individual coverage provision, not the "enterprise" provision. Accordingly, whether the hotel's "annual gross volume" of "business done" exceeded $500,000 is irrelevant, and the Court need not resolve the parties' dispute on this point.

III. LIABILITY OF CHEN

A. The Employer-Employee Relationship Under the FLSA

A person or entity "employs" an individual under the FLSA if it "suffer[s] or permit[s]" that individual to work. 29 U.S.C. § 203(g). An "employer" includes "any person acting directly or indirectly in the interest of an employer in relation to an employee." *Id.* § 203(d). These definitions are necessarily broad, "in accordance with the remedial purpose of the FLSA." *Zheng v. Liberty Apparel Co., Inc.*, 355 F.3d 61, 66 (2d Cir. 2003) (citations omitted); *accord Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 ("Above and beyond the plain language [of the FLSA], moreover, the remedial nature of the statute further warrants an expansive interpretation of its provisions so that they will have 'the widest possible impact in the national economy.'" (quoting *Carter v. Dutchess Comm'y Coll.*, 735 F.2d 8, 12 (2d Cir. 1984))); *see also Ansoumana v. Gristede's Operating Corp.*, 255 F. Supp. 2d 184, 188 (S.D.N.Y. 2003) ("The terms are to be expansively defined, with 'striking breadth,' in such a way as to 'stretch . . . the meaning of employee to cover some parties who might not qualify as such under a strict application of traditional agency law principles.'" (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992))). Whether an employment relationship exists is determined as a matter of "economic reality," *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961), based on "the circumstances of the whole activity," *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947).[12]

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[12] "The definition of 'employer' is similarly expansive under New York law, encompassing any 'person employing any [employee].'" *Yang*, 427 F. Supp. 2d at 342 (quoting N.Y. Lab. L. § 2(6)); *accord Chan v. Sung Yue Tung Corp.*, No. 03 Civ. 6408 (GEL), 2007 WL 313483, at *12 (S.D.N.Y. Feb. 1, 2007) (citations omitted). As "[t]here is general support for giving FLSA and the New York Labor Law consistent interpretations,"*Topo v. Dhir*, No. 01 Civ. 10881 (PKC), 2004 WL 527051, at *3 (Mar. 16, 2004 S.D.N.Y.), courts have interpreted the definition of "employer" under the New York Labor Law coextensively with the definition used by the FLSA, *Yang*, 427 F. Supp. 2d at 342 n.25 (applying economic reality test to determine

Because "employs" and "employer" are defined so broadly under the FLSA, it is possible for multiple entities to function as "joint employers" for purposes of the statute. *Zheng*, 355 F.3d at 66 (citations omitted); *Moon*, 248 F. Supp. 2d at 236-37; *see also* 29 C.F.R. § 791.2(a) (Under the FLSA, "[a] single individual may stand in the relation of an employee to two or more employers at the same time."); *Baystate Alternative Staffing v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998) ("The FLSA contemplates several simultaneous employers, each responsible for compliance with the Act.") (citing *Falk v. Brennan*, 414 U.S. 190, 195 (1973)). Four factors are relevant to a district court's determination of whether a party is a "joint employer" under the economic reality test: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Carter*, 735 F.2d at 12. These factors, however, are not exclusive. *See Herman*, 172 F.3d at 139 ("[E]conomic reality is determined based upon *all* the circumstances, [and] any relevant evidence may be examined so as to avoid having the test confined to a narrow legalistic definition.") (emphasis in original; citation omitted). Further, not every factor must weigh in favor of joint employment for a party to be held liable under the FLSA. *Zheng*, 355 F.3d at 76-77 (citing *Antenor v. D & S Farms*, 88 F.3d 925, 937-38 (11th Cir. 1996)).

In cases where a corporation is a worker's nominal employer, individual officers or directors of that corporation may also "be deemed employers under the FLSA where 'the individual has overall operational control of the corporation, possesses an ownership interest in it, controls significant functions of the business, or determines employees' salaries and makes

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whether individual defendant was joint employer under both federal and state law) (citations omitted); *accord Chen v. Street Beat Sportswear, Inc.*, 364 F. Supp. 2d 269, 278 (E.D.N.Y. 2005) (citations omitted). Accordingly, the economic reality test will be used to determine whether Chen is Jiao's employer as defined under both federal and state law.

hiring decisions.'" *Ansoumana*, 255 F. Supp. 2d at 192 (quoting *Lopez v. Silverman*, 14 F. Supp. 2d 405, 412 (S.D.N.Y. 1998)); *see also Baystate Alternative Staffing*, 163 F.3d at 678 ("At bottom, [the] economic reality analysis focuse[s] on the role played by the corporate officers in causing the corporation to undercompensate employees and to prefer the payment of other obligations and/or the retention of profits."). The Second Circuit has not developed a specific test for determining an individual officer's liability, stating instead that "the overarching concern is whether the alleged employer possessed the power to control the workers in question." *Herman*, 172 F.3d at 139.[13] The individual officer's control, however, need not have been "absolute": "[c]ontrol may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA, since such limitations on control do not diminish the significance of its existence." *Id.* (internal quotation marks and citations omitted); *see also Zheng*, 355 F.3d at 69 ("[T]he broad language of the FLSA . . . demands that a district court look beyond an entity's formal right to control the physical performance of another's work before declaring that the entity is not an employer under the

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[13] This Court has summarized the Second Circuit's holding as follows:

> In *Herman*[], the Second Circuit found that a shareholder and member of the board was an "employer" under the FLSA where he had the authority to hire managerial staff, occasionally supervised and controlled employee work schedules, and had the authority to sign payroll checks. The Court emphasized that "the overarching concern is whether the alleged employer possessed the power to control the workers in question," and looked at the "totality of the circumstances" in determining whether defendant had "operational control." Thus it did not matter that the putative employer did not directly hire workers, but only managerial staff, and that he did not have direct control over the workers in question; instead, the Court looked at whether he had "operational control" over the business.

Ansoumana, 255 F. Supp. 2d at 192-93 (internal citations omitted).

FLSA."); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1060 (2d Cir. 1989) ("An employer does not need to look over his workers' shoulders every day in order to exercise control.").

B. Chen's Relationship With Jiao

Here, Chen contends that the evidence does not support a finding that she was Jiao's employer under the FLSA. Chen suggests, instead, that Dalton USA employed Jiao. Despite Chen's arguments to the contrary, however, the "economic reality" of their relationship establishes that Chen "possessed the power to control" employees such as Jiao. The evidence specifically shows that, throughout the duration of Jiao's employment, Jiao worked for Chen, the president of Dalton USA, and that Chen supervised and determined Jiao's work responsibilities and employment conditions. Chen hired Jiao, informed him of his pay rate, paid him, and set his schedule. Although Chen was frequently absent from the hotel, there was no evidence that any other person was responsible for supervising Jiao's employment. *See Carter*, 735 F.2d at 13 ("[T]he fact that control over a worker may be qualified is not a sufficient factor, in and of itself, to place an employment relationship beyond the scope of the FLSA."). Indeed, Jiao had to answer to Chen when hotel patrons complained or other problems arose. Considering the totality of the circumstances, the record demonstrates that Chen was an employer, and Chen should therefore be held individually liable for any violations in compensating Jiao pursuant to the FLSA. *See, e.g.*, *Moon*, 248 F. Supp. 2d at 237-38 (finding individual defendant liable where he played "intimate role in the day-to-day operations of the hotel, regularly working out of an office in the hotel, supervising and determining [plaintiff's] work responsibilities and employment conditions, and even claiming to have personally hired him and arranged housing for him"); *Cao v. Chandara Corp.*, No. 00 Civ. 8057 (SAS)(KNF), 2001 WL 34366628, at *4 (S.D.N.Y. July 25, 2001) (holding individual liable under FLSA, where defendant played role in hiring and firing plaintiff, supervised and controlled his work schedule and conditions of employment, and determined rate and method of payment).

Furthermore, the Court's conclusion on this point would not be affected by a finding that Dalton USA was the owner of the hotel during Jiao's employment, and therefore could also be considered his employer under the FLSA. As discussed above, more than one defendant may be considered an employer under the FLSA. Accordingly, Chen is subject to liability under the FLSA, and correspondingly under New York Labor Law (*see supra* at n.12).

IV. FAILURE TO PAY MINIMUM WAGE AND OVERTIME

A. Fair Labor Standards Act

The FLSA requires that an employee receive a minimum wage[14] and overtime pay at the rate of "time and a half" of the worker's regular hourly rate for each hour worked in excess of 40 hours per work-week. 29 U.S.C. §§ 206(a)(1), 207(a)(1).

1. Compensable Hours

In determining whether Jiao was improperly compensated under the FLSA, the Court must first consider the number of compensable hours Jiao worked each week. The statutory term "hours worked" has been interpreted to include both "(a) [a]ll time during which an employee is required to be on duty or to be on the employer's premises or at a prescribed workplace and (b) all time during which an employee is suffered or permitted to work whether or not he is required to do so." 29 C.F.R. § 778.223. Time spent waiting for work is compensable if the waiting time is spent "primarily for the benefit of the employer and his business." *Armour & Co. v. Wantock*, 323 U.S. 126, 132 (1944) (internal quotation marks and citations omitted).

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[14] During the period at issue in this case, the minimum wage was $5.15 per hour. *See* 29 U.S.C. § 206(a)(1).

"Whether time is spent predominately for the employer's benefit [is] dependent upon all the circumstances of the case." *Id.* at 133; *accord Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Based on the evidence presented in a particular case, a court must determine whether, during a given time period, the plaintiff-employee was "engaged to wait," which is compensable, or merely "waited to be engaged," which is not compensable. *Skidmore*, 323 U.S. at 137; *see also* 29 C.F.R. § 785.15 (employee whose periods of inactivity are "unpredictable" and "usually of short duration," such that employee "is unable to use the time effectively for his own purposes," is "engaged to wait" and his inactive time is still compensable under the FLSA, even if "the employee is allowed to leave the premises or the job site during such periods of inactivity"). Under the FLSA, the hours of an employee who is "engaged to wait" for 24 hours or more at a time may still be compensable, even if the employee is able to sleep during periods of inactivity. *See* 29 C.F.R. § 785.22; *see also Moon*, 248 F. Supp. 2d at 229-30.

Here, Chen asserts that, even if Jiao was required to be present at the hotel 24 hours per day, he is not entitled to compensation for all of those hours, as he was not actually working for much of the time. She maintains that time spent by Jiao at the hotel "waiting for an assignment" was not work, as he had the ability to sleep and engage in personal activities. (Def. Post-Tr. Mem. at 14.) Jiao, on the other hand, contends that he is entitled to compensation for all hours spent at the hotel, including time during which he was "on-call."

The Court finds that, for purposes of the FLSA, Jiao should be compensated for all of his time at the hotel. During the daytime and evening hours, when Jiao was not cleaning or doing laundry, he was required to be at the reception desk in the hotel lobby. He was not free to leave, as he had to answer the phones, allow guests inside, and check guests in and out of the hotel.

Jiao credibly testified that, when he was unavailable to answer the phone or perform these other tasks, he was reprimanded by Chen. Although Jiao may have engaged in personal activities while sitting at his desk, such as using his computer to research stocks, he was there primarily for the benefit of his employer. *See Moon*, 248 F. Supp. 2d at 222, 230 (finding that, even if plaintiff did spend time socializing at work while waiting for assignments, this was insufficient to render that waiting time noncompensable, where, *inter alia*, plaintiff risked getting in trouble if he left the workplace). Accordingly, even during periods of inactivity in which Jiao may have been waiting for a telephone call or a guest to arrive, he was "engaged to wait" and therefore should have been paid in accordance with the FLSA.

A closer question is presented by the overnight hours that Jiao spent at the hotel. In *Moon*, the court held that the plaintiff was not entitled to compensation for the night-time hours he spent at the hotel where he both worked and resided. Here, as was the case in *Moon*, the nature of Jiao's waiting time was different during the night than it was for any other portion of his day. At night, Jiao had less work to do, both in terms of cleaning the hotel and tending to the needs of guests. As a result, he presumably had longer periods of time between tasks than he did during the day, and he could use that time for pursuing private interests or for sleeping. *See id.* at 230 (plaintiff's waiting time during evening was different than that during night, since his work during evenings was more frequent, and periods of inactivity during evenings were shorter, making it far more difficult for him to "'to use the time effectively for his own purposes'") (quoting 29 U.S.C. § 785.15).

In contrast to the plaintiff in *Moon*, however, Jiao was required to remain on the hotel premises during the night. *See Moon*, 248 F. Supp. 2d at 224, 229-30 (finding that employer did not require plaintiff to live in the hotel, or to remain at work all night on stand-by status, and therefore he was not "on-duty" during these hours). If Jiao left the hotel, late-arriving guests would be locked out, and newcomers would be unable to check into their rooms. Moreover, there was no evidence that Jiao could have traded his night responsibilities with another employee, enabling him to leave the premises during the night-time hours. *Cf. Brigham v. Eugene Water & Elec. Bd.*, 357 F.3d 931, 936-38 (9th Cir. 2004) (concluding that factors used to determine whether wait time should be compensated weighed in favor of employees, where employees were required to live on premises and were subject to strict geographical restrictions when on-call, even where employees could easily trade shifts or call-out because of sickness and could engage in personal activities during their idle time). In light of the severe restrictions on Jiao's freedom, the Court concludes in this case that Jiao is entitled to compensation for the full time he was required to be on the hotel premises.[15]

Accordingly, in the particular circumstances of this case, the Court concludes that Jiao should have been compensated for 162.5 hours of work per week, which includes all of the time that he was required to be at the hotel.[16] This figure will be used to determine whether, under the

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[15] In some cases where plaintiffs were not permitted to leave their employers' premises, courts have nonetheless limited their compensation. *See Rosseau v. Teledyne Movible Offshore, Inc.*, 805 F.2d 1245, 1247 (5th Cir. 1986); *Allen v. Atlantic Richfield Co.*, 724 F.2d 1131, 1136-37 (5th Cir. 1984). In each of those cases, however, the court found that the parties had an agreement, whereby the employee would only be compensated for hours actually worked, and not for time spent waiting to work. *See, e.g.*, *Rosseau*, 805 F.2d at 1248 (employees not entitled to compensation for wait time, where they had implicitly accepted employer's policy, which compensated employees only for actual work time). Here, in contrast, there is nothing in the record to suggest the existence of any agreement of this type, either express or implied, between Chen and Jiao. Notably, Chen does not contend that her arrangement with Jiao amounted to such an agreement, or that the hotel had any such policy which Jiao could have impliedly accepted by continuing to work at the hotel.

[16] This calculation is reached by subtracting 5.5 hours, the approximate number of hours that Jiao was not required to be at the hotel on Thursday afternoons, from 168 hours, the total number of hours in a week.

FLSA, Jiao was improperly compensated, and if so, to calculate the amount of damages he is owed by Chen.

2. Employee's Rate of Compensation

To determine whether an employee received adequate compensation under the FLSA, a court must determine the "regular rate" of pay that the employee received, which has been defined as "the hourly rate actually paid the employee for the normal, non-overtime work-week for which he is employed." *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945) (citations omitted); *see also Yang*, 427 F. Supp. 2d at 338; *Moon*, 248 F. Supp. 2d at 230. The compensation that an employee receives as part of his regular rate of pay includes "the reasonable cost . . . to the employer of furnishing such employee with . . . lodging" that the employer "customarily furnishe[s]" to its employees. 29 U.S.C. § 203(m); *see also Moon*, 248 F. Supp. 2d at 230-31 (citing cases). As with the other terms and conditions of the employment, the employer is required to maintain records substantiating the cost of any such lodging provided to its employees. 29 C.F.R. § 516.27(a). Further, although Section 203(m) creates a presumption that the cost of lodging is a reasonable cost deductible from wages, the presumption may be rebutted under "special circumstances." *Soler v. G. & U., Inc.*, 833 F.2d 1104, 1109-10 (2d Cir. 1987). "[W]here lodging is of little benefit to an employee," the cost of lodging will not constitute compensation received by the employee for purposes of the FLSA. *Id.* (internal citation omitted) (noting that presumption is subject to challenge and rebuttal under balancing of benefits standard of regulation providing that cost of "facilities" primarily for the benefit or convenience for the employer will not be included in computing wages).

Although an employer may choose to pay an employee on a weekly (or other) basis, "an employee's regular rate is nevertheless an hourly rate of pay, determined by dividing the employee's weekly compensation by the number of hours for which that compensation [was] intended." *Moon*, 248 F. Supp. 2d at 230 (citing 29 C.F.R. §§ 778.109, 778.113(a)); *see also Yang*, 427 F. Supp. 2d at 338 (citations omitted). There is a rebuttable presumption that an employer's payment of a weekly salary represents compensation for the first 40 hours of an employee's work-week; the burden is on the employer to rebut this presumption with evidence that the employer and employee had an agreement that the employee's weekly compensation would cover a different number of hours. *Giles v. City of New York*, 41 F. Supp. 2d 308, 317 (S.D.N.Y. 1999); *see also Yang*, 427 F. Supp. 2d at 335; *Moon*, 248 F. Supp. at 208. When an employer is unable to produce a written employment agreement or memorandum summarizing an oral agreement, "the Court must infer the terms of [the parties'] agreement from the entire course of their conduct, based on the testimonial and documentary evidence in the record." *Moon*, 248 F. Supp. 2d at 206.

Here, in calculating Jiao's regular rate of pay, the Court must first determine how much Jiao was compensated per week. As discussed previously, the parties do not dispute that Jiao was paid $400 in cash each week. There is a question, however, as to whether the value of Jiao's lodging should be included in determining how much Jiao was compensated. Neither party disputes that the hotel provided Jiao with living accommodations rent-free throughout the entirety of his employment, allowing him, on most nights, to stay in Room 303. Chen, however, did not keep the legally-required records or substantiate, in any way, the reasonable costs incurred by the hotel in providing Jiao with a place to live. In similar cases, where defendants failed to provide any indication of how much it cost to furnish plaintiffs with housing, courts have "routinely den[ied] employer offsets under the FLSA." *Brock v. Carrion, Ltd.*, 332 F. Supp. 2d 1320, 1324-27 (E.D. Cal. 2004) (citing *Donovan v. Williams Chem. Co., Inc.*, 682 F.2d

185 (8th Cir.1982)); *but see Moon*, 248 F. Supp. 2d at 214 (without any evidence as to value of lodging, court estimated reasonable cost of providing plaintiff with lodging as $50 per week). Notwithstanding the absence of any record evidence on this point, Chen nevertheless suggests that, if the Court is inclined to factor the value of housing into Jiao's weekly pay, this calculation should be based on the normal room rate. (*See* Def. Post-Tr. Mem. at 16-17.) Such an approach would be improper. The fact that customers were charged between $80 and $95 per night for a room does not establish the value of the lodging under the FLSA, as the reasonable cost of the hotel room cannot include profit. *Estanislau v. Manchester Developers, LLC*, 316 F. Supp. 2d 104, 109 (D. Conn. 2004) ("Reasonable cost cannot include profit, 29 C.F.R. 531.3(b), which it is assumed [d]efendant would receive if it rented the apartment to a member of the public.").

Moreover, as Jiao was living on the hotel premises primarily for the benefit of his employer, the Court finds that "special circumstances" exist to rebut the presumption under Section 203(m) that the cost of lodging should be factored into his compensation. Jiao was required by Chen to live at the hotel in order to assist late-arriving guests and to answer late-night telephone calls. *See Soler*, 833 F.2d at 1109-10 (noting situations in which lodging may be of little benefit for employee, such as where "employer requires an employee to live on site to meet a particular need of the employer or when an employee is required to be on call at the employer's behest"). Accordingly, based on the evidentiary record of this case, the Court will not consider the cost of furnishing Jiao with housing in computing his weekly compensation. *See Schneider v. Landvest Corp.*, No. 03 Civ. 2474 (WYD)(PAC), 2006 WL 322590, at *28 (D. Colo. Feb. 9, 2006) (holding that defendant was not entitled to have cost of lodging included in calculating wages where housing was furnished primarily for benefit of employer and where plaintiffs were required to reside at employer's facility); *cf. Soler*, 833 F.2d at 1110 (finding that substantial factual evidence supported ALJ's conclusion that employees' compensation, under FLSA, included cost of housing where, *inter alia*, workers were not required to live on employer's premises and workers not "on-call"); *Moon*, 248 F. Supp. 2d at 213-14 (noting that plaintiff was not required to live at hotel as condition of employment in determining that plaintiff's weekly compensation should include value of lodging). Therefore, the Court finds that Jiao was compensated a total of $400 per week.

Next, to calculate Jiao's regular rate of pay, the Court must convert his weekly wage into an hourly rate. This amount is calculated by dividing the total number of hours that the wage was intended to cover by the amount actually paid each week. Although there is a rebuttable presumption that a weekly wage covers 40 hours, both parties contend that Jiao's salary was intended to cover a different number of hours. Chen contends that Jiao was hired pursuant to an oral contract to work 30.5 hours per week, and that his weekly wage should thus be understood by the Court to have covered that number of hours. There is, however, no basis in the record from which the Court can conclude that Jiao was actually hired pursuant to such a contract. Indeed, no witness with any personal knowledge of the matter testified that Chen (or Dalton USA, for that matter) had entered into such a contract with Jiao. As there is no evidence supporting Chen's contention that Jiao was hired pursuant to a contract for which he was to be paid for 30.5 hours of work per week, the Court cannot find that the parties understood that Jiao's weekly wage was intended as compensation for this number of hours.

For his part, Jiao contends that the parties had agreed that his weekly wage was to serve as compensation for all hours that he worked per week (*i.e.*, 162.5 hours). (*See* Pl. Post-Tr. Br. at 7 (noting only that the parties had agreed that Jiao "would work for $400 per week"); Tr. at 33 (Jiao testifying that Chen told him he had to work 24 hours per day).) On this point, the Court notes that Jiao's position is somewhat contrary to his self-interest, as the amount of overtime pay that he would be owed based on a 30.5-hour-per-week agreement – or even a 40-hour-per-week agreement – would be considerably higher than the amount he would be owed based on a 162.5-hour-per-week agreement. This is because, if $400 were intended as his pay for 30.5 hours, then his hourly rate would have been over $13 per hour, and his overtime rate of "time and a half" would have been almost $20 per hour. A similar calculation based on a 40-hour-week would yield an overtime rate of $15 per hour. In contrast, if his weekly pay were intended to cover over 160 hours per week, then his pay for the first 40 hours of work per week would have clearly fallen below the minimum wage. This would result in a need to increase his regular pay to the level of the minimum wage (*i.e.*, $5.15 per hour), and would result in an overtime rate of less than $8.00 per hour. (*See infra* at 31.) Given his large number of overtime hours, Plaintiff's damages award in this case would, in the end, be considerably higher if he were to accept Chen's position that the parties had an agreement that his pay was intended only for the first few hours of the time he was actually expected or permitted to work at the hotel. The Court finds Jiao's testimony on this issue to be credible – all the more so because it is ultimately contrary to his economic interest. *See Yang*, 427 F. Supp. 2d at 335 (noting that plaintiff's testimony that he agreed to work 50 hours per week for a weekly salary was against his interest, as it rebutted the 40-hour presumption and thus lowered his regular rate of pay for purposes of calculating overtime damages, and finding that such testimony bolstered plaintiff's credibility).[17]

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[17] Although the Court concludes that the 40-hour presumption has been rebutted, neither party contends, nor is there any evidence to support, a finding that Jiao's weekly compensation included an overtime premium. *Giles*, 41 F. Supp. 2d at 317 ("Unless the contracting parties intend and understand the weekly salary to include overtime hours at the premium rate, courts do not deem weekly salaries to include the overtime premium for workers regularly logging overtime . . . ."); *see also Yang*, 427 F. Supp. 2d at 335 n.10.

Accordingly, the Court finds that the parties agreed that Jiao's compensation of $400 per week would represent payment for all of the time that he worked at the hotel. As Jiao's weekly wage was $400, and was intended to cover 162.5 hours per week (and did not include an overtime premium), the Court finds that his regular rate of pay was $2.46 per hour.

3. Calculation of Damages

a. Minimum Wage and Overtime

Based on the Court's findings above, Jiao has established that he was not appropriately compensated under the FLSA. Having found that Jiao was actually paid at a rate of $2.46 per hour, and since the minimum wage during his employment was $5.15 per hour for the first 40 hours of work per week, Jiao is entitled to $2.69 per hour for the base 40 hours per week. As Jiao worked from April 2001 until the first week in October 2002, totaling approximately 75 weeks,[18] Jiao is owed $8,070 in unpaid wages.[19]

In addition to violating the minimum wage requirements of the FLSA, Chen also failed to pay Jiao adequate overtime compensation. For any hours worked in excess of 40 hours per week, Jiao should have received a minimum of $7.73 per hour (time and a half of the minimum wage) for his overtime hours. *See Cao*, 2001 WL 34366628, at *6 ("Since [plaintiff] was unlawfully paid less than the minimum wage, the overtime calculation must be based on the minimum wage to which he was entitled."). Jiao instead was paid $2.46 per hour, resulting in a delinquency of $5.27 per hour. Given that Jiao worked 122.5 hours of overtime per week for 75 weeks, he is entitled to $48,418.13 in overtime wages.[20]

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[18] According to Jiao's testimony, which the Court finds credible (*see supra* at n.4), Jiao ceased working for the hotel in the first week of October 2002. As Jiao, however, never testified to the exact date that he stopped working, the Court estimates that Jiao's employment at the hotel ended on October 1, 2002. Accordingly, Jiao worked 75 weeks, which is the number of weeks between April 25, 2001 and October 1, 2002.

[19] This figure is reached by multiplying the amount owed to Jiao per hour ($2.69) by the maximum number of hours an employee can work without receiving overtime pay under the FLSA (40), and then multiplying this result by the number of weeks that Jiao worked at the hotel (75).

In total, Jiao is owed $56,488.13 in back wages under the FLSA.

b. Liquidated Damages

In addition, Jiao is entitled to liquidated damages under the FLSA. Any "employer" who fails to provide adequate compensation under the FLSA "shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). The statute provides for liquidated damages in order to compensate employees for the often obscure and hard-to-prove consequences of having been wrongfully denied pay, rather than to punish employers. *Reich*, 121 F.3d at 71. "Courts have discretion to deny an award of liquidated damages where the employer shows that, despite the failure to pay appropriate wages, the employer acted in subjective 'good faith' and had objectively 'reasonable grounds' for believing that the acts or omissions giving rise to the failure did not violate the FLSA." *Herman*, 172 F.3d at 142 (quoting 29 U.S.C. § 260). The employer bears a "difficult" burden of proving this defense, however, "with double damages being the norm and single damages the exception." *Id.* at 142 (citing *Reich*, 121 F.3d at 71). To carry this burden, the employer "must produce plain and substantial evidence of at least an honest intention to ascertain what the [FLSA] requires and to comply with it." *Reich*, 121 F.3d at 71 (internal quotation marks and citation omitted).

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[20] This amount is reached by multiplying the number of overtime hours Jiao worked in a week (122.5) by the amount owed to Jiao for each hour of overtime worked ($5.27). That result is then multiplied by the number of weeks that Jiao was employed by the hotel (75).

In this case, there is no evidence that Chen's violations of the FLSA were made in good faith. There is nothing in the record demonstrating that Chen made an effort to ascertain or comply with her obligations under the FLSA. In fact, Chen failed even to maintain basic employee records. Moreover, Chen paid Jiao "off-the-books in cash," and failed to compensate Jiao for extensive overtime work. *Tlacoapa v. Carregal*, 386 F. Supp. 2d 362, 368 (S.D.N.Y. 2005); *see also Moon*, 248 F. Supp. 2d at 234-35; *Dingwell v. Friedman Fisher Assocs., P.C.*, 3 F. Supp. 2d 215, 223 (N.D.N.Y. 1998) (awarding employee liquidated damages where employer failed to take "active steps" to ensure compliance with FLSA). As Jiao is entitled to $56,488.13 in unpaid back wages as result of Chen's failure to properly pay him both minimum wage and overtime compensation (*see supra* at 32), Jiao will also be awarded an additional $56,488.13 in liquidated damages under 29 U.S.C. § 216(b).

Accordingly, Chen is liable to Jiao for $112,976.26 in damages under the FLSA.

B. New York Labor Law

Like the FLSA, the New York Minimum Wage Act ("NYMWA") requires employers to pay a minimum wage[21] and time and a half for overtime. N.Y. Comp. Codes R. & Regs. tit. 12, §§ 142-2.1, 142-2.2; *see also* N.Y. Lab. L. § 652. There are, however, several differences between the two statutes, which may impact the amount of damages a successful plaintiff may recover. *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 12, § 138-2.2 (providing that residential workers receive overtime pay only for hours worked in excess of 44 hours per work-week); *id.* § 138-2.7 (setting forth specific values for cost of meals and lodging provided by hotel

[21] At $5.15 per hour, the New York minimum wage was the same as the federal minimum wage during the period at issue in this case. *See* N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.1.

employers); N.Y. Lab. L. § 198(1-a) (providing that employees may recover 25 percent of unpaid wages in liquidated damages).

The Court, however, need not calculate Jiao's damages under the NYMWA. Jiao cannot recover twice for the same minimum wage/overtime violations under both federal and state law. *See Ellerbe v. Howard*, No. 86 Civ. 957E, 1989 WL 64156, at *4 n.3 (W.D.N.Y. June 13, 1989) (noting that plaintiffs, who claimed FLSA violation, were not also seeking "duplicative recovery" under New York's minimum wage laws); *see also Walker v. Washbasket Wash & Dry*, No. 99 Civ. 4878, 2001 WL 770804, at *19 (E.D. Pa. July 5, 2001) (concluding that plaintiff was "not entitled to a duplicative award of both federal and state law damages for the same time periods"). Where a plaintiff is entitled to damages under both federal and state wage law, a plaintiff may recover under the statute which provides the greatest amount of damages. *See Estanislau*, 316 F. Supp. 2d at 112 n.2 (noting that "[t]o the extent that state law provides a greater remedy than the FLSA, [p]laintiff would not be precluded from recovering under it") (citation omitted).

Here, Jiao's recovery would be greater under federal law. State law limits liquidated damages to 25 percent of unpaid wages, in contrast to federal law, which allows for an award of liquidated damages in a sum equal to the full amount of unpaid wages. N.Y. Lab. L. § 198(1-a). As the amount Jiao could recover under state law would be less than the amount he should receive under the federal statute, Jiao is entitled to those damages calculated pursuant to the FLSA. *See Estanislau*, 316 F. Supp. 2d at 112 n.2 ("It goes without saying . . . that state law cannot reduce entitlements under federal law."); *Walker*, 2001 WL 770804, at *19 (awarding plaintiff back wages and liquidated damages under FLSA, not state law, as it was "the higher of the two").

C. Attorney's Fees and Costs

Under the FLSA, where a defendant has failed to pay an employee the proper minimum wages or overtime compensation, "the court in such action shall, in addition to any judgment awarded to the plaintiff . . ., allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 216(b). Because Chen did not properly compensate Jiao under both Sections 206(a) and 207(a) of the FLSA, the Court finds that Jiao is entitled to reasonable attorney's fees and costs. Accordingly, Jiao may submit a fee application to the Court.

CONCLUSION

For all of the foregoing reasons, Jiao has proved, by a preponderance of the evidence, that Chen failed to adequately compensate Jiao under the FLSA and the NYMWA. For these violations, the Court awards Jiao damages totaling $112,976.26 for which Chen is liable.

Jiao may submit an application for fees and costs, together with a proposed form of judgment no later than April 30, 2007. Chen may submit any opposition to Jiao's submission no later than May 15, 2007.

Dated: New York, New York
March 30, 2007

SO ORDERED

DEBRA FREEMAN
United States Magistrate Judge

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